SUPREME COURT, U.S.
FILED
DEC 9 1975
MICHAEL RODAK, JR., CLERK

No. 75-526

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

NORTON J. COMB,
Deputy Associate General Counsel,

FRANK C. MORRIS, JR.,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 520 F.2d 411. The decision and order of the National Labor Relations Board (Pet. App. 22a-49a) are reported at 211 NLRB No. 18.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order (Pet. App. 20a-21a) was entered on August 22, 1975. The petition for a writ of certiorari was filed on October 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Union violated Section 8(b)(2) and Section 8(b)(1)(A) of the National Labor Relations Act by demanding the discharge of an employee for failure to pay union dues under the "agency shop" clause of the collective bargaining agreement, after having denied union membership to the same employee because he had exercised his statutory right to engage in organizational activity on behalf of another union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 3-5.

STATEMENT

Local 1104, Communications Workers of America ("CWA") is the collective bargaining representative for certain employees of the New York Telephone Company (herein "Telco") (Pet. App. 24a-25a). Under the CWA-Telco contract which expired on July

28, 1971, membership in the Union was voluntary as the contract contained only a provision requiring those employees who were then Union members to continue to pay dues (Pet. App. 25a-26a). On July 14, 1971, Local 1104 and other CWA locals struck Telco to seek a new contract.[1] The strike ended in February of 1972, when a new agreement was reached. This agreement contained, for the first time, an "agency shop" clause, which provided (Pet. App. 26a-27a):

> 33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive.

Wellington G. Rigby has been a Telco employee since July 6, 1948. He became a member of Local 1104 in May of 1969, and remained a member until July 7, 1971, when, as permitted by the collective bargaining agreement then in effect, he resigned from the Union. Rigby honored the Union's picket lines

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[1] The strike was illegal because of the failure to comply with the notice provisions of Section 8(d) of the Act. See *Communication Workers of America (New York Telephone Co)*, 208 NLRB 267.

during the strike and returned to work only after the strike had ended. (Pet. App. 34a.)

In the spring of 1972, Rigby engaged in organizing activities for the Teamsters. On July 20, 1972, after he had ceased his Teamsters activities, Rigby applied for membership in Local 1104 (Pet. App. 34a). At the same time, he executed a checkoff card authorizing the Company to deduct membership dues from his wages (*ibid.*). On September 2, Rigby reiterated his membership request in a letter to the Union and tendered the dues requested by the Union by personal check (J.A. 6a-7a, 10a).[2]

On September 5, Local 1104 refused Rigby's application for membership solely on the ground that he previously had engaged in organizational activities on behalf of a rival union (Pet. App. 34a-35a). After this denial of membership, Rigby made no further tender of dues. Local 1104 demanded that Telco terminate Rigby's employment for failure to pay dues, pursuant to the agency shop clause of the agreement (Pet. App. 35a).

On these facts, the Board, adopting the findings of the Administrative Law Judge, held that Local 1104's request that Telco discharge employee Rigby because he refused to pay amounts equal to dues after the Union had denied him membership for exercising his Section 7 rights violated Section 8(b)(2) and Section 8(b)(1)(A) of the Act. The Board ordered Local 1104 to cease and desist from the foregoing un-

[2] "J.A." refers to the Joint Appendix filed in the court of appeals, a copy of which has been lodged with this Court.

lawful conduct (Pet. App. 22a-49a).[3] The court of appeals enforced the Board's order (Pet. App. 1a-19a).

ARGUMENT

The decision of the court of appeals is correct and is consistent with the decision of this Court in *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734. Further review is therefore not warranted.

1. "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40. The only exception to this policy is where there is a valid union security clause in a collective bargaining agreement; in that event, an employee may be discharged for failure "to

[3] The Board also found, in the consolidated proceeding below, that Local 1101, CWA, had violated Section 8(b)(2) and Section 8(b)(1)(A) of the Act by requesting Telco to discharge 29 employees who refused to pay amounts equal to dues after the Union denied them membership for crossing the illegal picket line (see n. 1, *supra*). It also concluded that the union had violated Section 8(b)(1)(A) by denying membership to these same employees for failing to observe that illegal picket line (Pet. App. 27a-34a, 35a-37a). The court of appeals sustained these findings (Pet. App. 4a-6a, 7a-19a), and Local 1101 does not challenge them here.

tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" (Section 8(a)(3), second proviso). However, Section 8(a)(3) and Section(b)(2) expressly prohibit job-related sanctions where an employee has been denied union membership on grounds other than his failure to tender such dues and fees. *International Union of Electrical Workers, Frigidaire Local 801* v. *National Labor Relations Board*, 307 F.2d 679, 682 (C.A.D.C.) (Burger, C.J.), certiorari denied, 371 U.S. 936. See also *In the Matter of Union Starch & Refining Co.*, 87 NLRB 779, enforced, 186 F.2d 1008 (C.A. 7), certiorari denied, 342 U.S. 815.[4]

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[4] Section 8(a)(3) expressly provides, *inter alia*:

> (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

In this case, the Union denied Rigby membership for engaging in rival union activity, conduct concededly protected by Section 7 of the Act. While the Union was privileged to deny him membership for this reason,[5] the limited statutory exception for discrimination based on a union security clause did not permit the Union to attempt to secure Rigby's discharge.[6] For, by its terms, that exception does not

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[5] The exclusion from membership was permissible under the proviso to Section 8(b)(1)(A), as the Board and the courts permit a union to defend its existence by denying membership or union office to employees who file decertification petitions or organize on behalf of rival unions. *E.g., Tawas Tube Products, Inc.*, 151 NLRB 46; *Int'l Molders' and Allied Workers, Local 125 (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208, enforced, 442 F. 2d 92 (C.A. 7).

[6] That Congress intended to bar, not only certain evils of compulsory unionism (Pet. 11-16), but also job-related sanctions where membership was denied for reasons other than nonpayment of dues and fees, is shown by the following colloquy between Senators Pepper and Ball (the latter a Senate manager of the bill):

> MR. PEPPER. And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.
>
> MR. BALL. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him. [93 Cong. Rec. 4272 (1947)].

Moreover, Congress contemplated that Section 8(b)(2) would prohibit a union from causing an employer to discrim-

apply where membership is denied for reasons other than the employee's failure to tender dues and fees. Accordingly, the Union's attempt to cause Rigby's discharge, not being privileged by the union security proviso to Section 8(a)(3), became the equivalent of an attempt to cause that discharge because of his protected activity, a clear violation of Section 8(b)(2) and Section 8(b)(1)(A) of the Act.[7]

2. Contrary to petitioner's contention (Pet. 18-19), the decision below is fully consistent with *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734. In that case, the Court held that an "agency shop" clause—that is, a provision which required all employees after 30 days to pay the union's regular initiation fee and monthly dues, but left to the employees the option whether to join the

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inate against an employee expelled for organizing on behalf of a rival union. Thus the Conference Report stated:

> (2) A provision which was contained in the Senate amendment in section 8(b)(2), designed to prevent an employer from discriminating against an employee covered by a union shop agreement, who had been expelled from the union for activities in behalf of another representative, is omitted as unnecessary since there is nothing in the conference agreement which permits an employer to discriminate against an employee who has been expelled for this reason. [H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44 (1947).]

[7] See *National Labor Relations Board* v. *Bell Aircraft Corp.*, 206 F. 2d 235, 238 (C.A. 2), where the union caused the employer to discriminate against the employee, not for the nonpayment of dues, but for crossing a picket line; see also Pet. App. 15a-16a.

union or not (373 U.S. at 744)—was a form of union security sanctioned by the proviso to Section 8(a)(3).[8] The Court left "for another case" "the significance of desired, but unavailable, union membership" (*id.* at 744-745, n. 12).

The court of appeals in this case considered that question and correctly concluded that where, as here, the union has denied the employee membership for exercising a right protected by Section 7, to permit it to require the employee to pay full union dues, is to deprive the employee of the membership option which *General Motors* recognized. As the court stated, such a requirement would enable the union to arrogate to itself "the employees' choice regarding union membership while nonetheless requiring them to pay dues" (Pet. App. 16a).

3. The decision below does not, as petitioner suggests (Pet. 20), deny a union the right to require each "employee represented by a union to pay his share of the cost of such representation." The record shows no difference in the amount of dues assessed full members and those sought from Rigby, and where the "service fee" charged to nonmembers is equal to the dues of full members and is allegedly allocated to collective bargaining costs, it follows that nonmembers are being required to pay more for the same services than are union members, or to sub-

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[8] The Court noted that the agency shop merely "places the option of membership in the employee while still requiring the same monetary support as does the union shop" (373 U.S. at 744).

sidize peripheral union activities. *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 373 U.S. 746, 753-754. Thus, this case does not present the question whether a union may require an employee to pay only "his share of the cost of union representation" (Pet. 3), after denying the employee membership because he exercised Section 7 rights.[9] Finally, contrary to petitioner's contention (Pet. 21), Rigby was not a "free rider." He had applied for union membership and tendered the requisite dues, only to be denied membership.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

FRANK C. MORRIS, JR.,
Attorney,
National Labor Relations Board.

DECEMBER 1975.

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[9] Cf. *J. J. Hagerty, Inc.*, 153 NLRB 1375 (hiring hall fee for nonmembers equal to union dues was discriminatory because portion of dues was used to defray union expenses unrelated to job opportunities of nonmembers).

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